In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1138

HAROLD W. HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals filed no opinion. The district court's opinion denying petitioner's motion for judgment of acquittal or dismissal (Pet. App. A) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on December 12, 1972. Timely petitions for rehearing and for rehearing *en banc* were denied January 19, 1973 (Pet. Apps. C and D). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the filing of an income tax return by a partnership relieves an individual partner from cri-

minal responsibility for failure to file his personal income tax returns.

2. Whether the jury was properly instructed on the issue of willfulness.

3. Whether the warnings given to petitioner by a special agent conformed with the applicable Internal Revenue Service standards.

STATEMENT

After a jury trial, petitioner, an attorney, was convicted in the United States District Court for the Eastern District of New York for willfully failing to file individual income tax returns for the years 1963, 1964, 1965, and 1966, in violation of 26 U.S.C. 7203. Petitioner was fined $1,500 and sentenced to two months' imprisonment. The court of appeals affirmed *per curiam*.

The evidence disclosed that petitioner was a partner in the law firm of Berg and Harrison in Great Neck, New York (R. 91a-92a).[1] He did not file personal income tax returns for the years 1963 through 1966 (R. 285a-286a); however, partnership returns were timely filed for these years and they showed that petitioner's distributive share of the partnership earnings ranged approximately from $9700 to $12,300 during those four years (R. 428a, Def. Exs. A-D). When the law firm was organized in 1953, petitioner told the firm's accountant, that he, petitioner, would take care of his own personal income tax returns (R. 254a-255a), and petitioner filed his own income tax returns for the years 1953 through 1961 (R. 285a).

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[1] "R." references are to the separately bound appendix filed in the court of appeals.

Petitioner was first interviewed by special agents of the Internal Revenue Service in his law office (R. 68a-69a, 91a). One of the agents informed petitioner that their function was to investigate criminal violations of the internal revenue laws (R. 116a-117a). The agent further told petitioner that he could have a representative present and that he had "rights under the Fifth Amendment of the Constitution not to answer any questions * * * or supply me with any material" (R. 70a, 93a). The petitioner replied that, as an attorney, he understood his constitutional rights and would answer the agents' questions (R. 72a, 86a). He then stated that he had filed his personal income tax returns for the years 1963 through 1966 (R. 98a). In fact, petitioner had not filed these returns as he was required to do (R. 281a-286a).

Prior to trial, petitioner moved for a judgment of acquittal or dismissal on the ground that the filing of the partnership returns absolved him from criminal responsibility for his own failure to file, because the partnership returns contained enough information for the Internal Revenue Service to prepare individual returns on his behalf.[2] The motion was denied in an extensive opinion (Pet. App. A), and petitioner's conviction was affirmed without opinion (Pet. App. B).

ARGUMENT

1. Petitioner here renews his contention (Pet. 8-15) that the filing of the partnership returns bars his

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[2] Contrary to petitioner's assertion here (Pet. 4,11,13), the Internal Revenue Service did not in fact complete substitute returns for petitioner pursuant to its authority to do so under 26 U.S.C. 6020. Blank returns, carrying only petitioner's name and address, were filed by the investigating agent in order to establish a file number for information retrieval purposes—for petitioner's case (R. 160a-165a, 430a-431a).

prosecution under 26 U.S.C. 7203 for failure to file. The substance of this contention appears to be that once the partnership returns were filed, the government had a duty to prepare his individual returns for him. This argument was answered by the district court on whose opinion we primarily rely (Pet. App. A). We add that the decision below does not conflict with the decisions in other courts of appeals holding that civil tax assessments may be made in the absence of a properly filed return (Pet. 14) or with the decisions of the court below with respect to failure to register as a narcotics addict or for selective service (*ibid.*). And there is no conflict with *Stockstrom* v. *Commissioner*, 190 F. 2d 283 (C.A. D.C.), where the court held that the taxpayer there had been entitled to rely on an express revenue ruling and pattern of administrative action in determining not to file. Nor does the decision below conflict with the decisions of this Court. *Venus* v. *United States*, 368 U.S. 345, and *Ward* v. *United States*, 344 U.S. 924, simply involved prosecutions in which the government failed to establish willfulness. And in *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304, this Court merely held that the filing of a fiduciary return by a corporate taxpayer begins the running of the statute of limitations on the tax liability of the corporation. These cases do not bear on the issue raised by petitioner.

Petitioner apparently additionally contends that the Internal Revenue Service did in fact prepare substitute returns for him and that these substitute returns satisfied his personal duty to file a return. This contention is factually erroneous; formal substitute returns were never prepared. See note 2, *supra*. Furthermore, even if such returns had been prepared, it would only have been after petitioner's crime—failure

to file—was complete; even a late filing by petitioner would not have cured his previous willful failure to file. See *United States* v. *Ming*, 466 F. 2d 1000, 1005 (C.A. 7), certiorari denied, 409 U.S. 915. Moreover, petitioner's duty to file was personal to him and would not be satisfied merely by government efforts to establish, through the preparation of a substitute return, the civil tax liability which his own failure to file had concealed.

2. Contrary to petitioner's contention (Pet. 15-18), the district court's instructions on willfulness were proper and in accord with the decision of all courts of appeals which have considered the matter. The trial judge charged the jury as follows (R. 393a, 403a):

> An act or failure to act is "willful" if the defendant acts voluntarily and intentionally, and with the specific intent to do something the law forbids or fails to do something the law requires—that is to say, with bad motive. Here the bad motive is that the defendant with the knowledge that he was required to file returns deliberately did not do so.

This charge, instructing the jury that a failure to file a tax return must be intentional and not merely accidental, conforms with that given in the other courts of appeals. See *United States* v. *Platt*, 435 F. 2d 789 (C.A. 2); *United States* v. *Vitiello*, 363 F. 2d 240 (C.A. 3); *Haner* v. *United States*, 315 F. 2d 792 (C.A. 5); *Gurtner* v. *United States*, decided February 5, 1973, No. 72-2167 (C.A. 9).[3] Proof of a "purpose of

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[3] See, also, *United States* v. *Bishop*, No. 71-1968, argued January 9, 1973, where we support the same willfulness standard of intentional

concealing from the government the extent of [a taxpayer's] tax liability" (Pet. 16) is not necessary for a conviction for willful failure to file. *Spies* v. *United States*, 317 U.S. 492, 496; *United States* v. *Matosky*, 421 F. 2d 410, 412 (C.A. 7), certiorari denied, 398 U.S. 904; *Lumetta* v. *United States* 362 F. 2d 644, 647 (C.A. 8).[4]

3. Petitioner contends (Pet. 18-21) that the investigating agents failed to comply with Internal Revenue News Release 897, dated October 3, 1967, in that they did not specifically inform him of his right to counsel.[5]

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conduct for the related tax misdemeanor under 26 U.S.C. 7207. Since *Bishop* involves Section 7207 and not Section 7203, the provision involved here, this petition need not be held pending disposition of that case. See also *Turnof* v. *United States*, No. 72-917, certiorari denied, March 5, 1973.

[4] Petitioner also contends that the jury should have been instructed that certain claimed expenses were deductible and that the jury could infer from this a lack of willfulness. But the evidence did not support petitioner's requested instructions with respect to expenses. In any event, the jury, which heard petitioner's explanation of his failure to file, was fully instructed on the defense of honest ignorance of a duty to file (R. 392a, 403a).

Petitioner further contends that the trial judge's mistaken comment during the taking of evidence—to the effect that the filing of the partnership returns might excuse petitioner's failure to file—vitiated the later, proper ruling that the partnership returns could be considered on the issue of willfulness but not as an absolute defense. But the judge's earlier remark was merely an error in petitioner's favor of which he is not entitled to complain. *Killian* v. *United States*, 368 U.S. 231, 257-258.

[5] I.R.S. News Release 897 provides:

> On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."

However, at the interview, which was non-custodial, petitioner forestalled any such warning by telling the agents that he was a lawyer himself and knew his constitutional rights. See p. 3, *supra*. Petitioner therefore is estopped from raising this issue now. Under the circumstances, furthermore, the warnings given were in substantial compliance with I.R.S. requirements. *United States* v. *Bembridge*, 458 F. 2d 1262, 1264 (C.A. 1); *United States* v. *Matthews*, 464 F. 2d 1268, 1270 (C.A. 5).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1973.

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.